United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket #74-1291

74-1291

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA

Plaintiff-Respondent

-vs-

MICHAEL LEE JACKSON

Defendant-Appellant

On Appeal from the United States District Court for the Western District of New York

BRIEF OF DEFENDANT-APPELLANT,
- MICHAEL LEE JACKSON

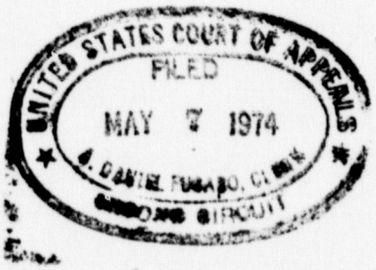

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Table of Cases

PRELIMINARY STATEMENT

This Appeal arises from a judgment of conviction rendered by Judge John T. Curtin in the Western District of New York, on September 20, 1973, who sitting without a jury, found the defendant Michael Lee Jackson guilty of a one-count indictment which charged a violation of Title 18, Section 2312, (transporting a stolen motor vehicle in interstate commerce). At the trial* it was stipulated by the Government and defense that the transcript of a suppression hearing held on July 24, 1973, would constitute the transcript of the trial. On February 21, 1974, after having undergone a lengthy psychiatric evaluation, the defendant was sentenced to an indeterminate term of up to four years in the custody of the Attorney General.

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* The transcript of the trial held on September 20, 1973, will be designated by placing the letter "T" before page references. No letter will be used to designate page references of the suppression hearing.

STATEMENT OF FACTS

Near midnight on June 14, 1973, Patrolman Harry Roth of the Batavia, New York Police Department was on routine patrol when he saw a car in an otherwise vacant alley, whose muffler was making a great deal of noise (6). The person in the car, who appeared to be in his late teens or early twenties, identified himself as Leon Smith but could not produce a license, registration or insurance card (6), and in fact he could produce no identification whatsoever (16).

"Smith", who later turned out to be the defendant Michael Lee Jackson, said that he had another friend, coincidentally also named Smith, who was in a nearby building. Officer Roth then went to the rear of the car, checked its license number and noticed that the defendant used a screwdriver to turn off the ignition (17,25). The patrolman then left the area because he was required at that time to check on another urgent call (7).

While he was away from the scene in question, Patrolman Roth put the car's license plate number through the NCIC computer and found out that the car in which the defendant was sitting had been stolen from Akron, Ohio, a few days earlier (8). He then returned to the automobile and began to ask the defendant more questions about himself and his alleged friend, which the defendant could not adequately

answer (22-24). Officer Roth then radioed a "10-12, which means that we are in the presence of someone that we don't want them to hear our transmissions so at this time I ask for ...help" (9). The patrolman admitted that he had called for help because "it certainly had gotten beyond a routine stage of investigation" (25), and that he was "very suspicious" of the defendant (25).

The two Batavia Police Officers responding to Patrolman Roth's call for "help" went directly to the alley where the call had come from, jumped out of their car, approached the defendant and asked him, "Did you steal the car?", to which the defendant responded, "Yes" (32). The defendant was then formally placed under arrest. Up to the point of his actual arrest, there is no claim he was given his Miranda warnings (32, 40-41).

The defendant was then taken to Police Headquarters where the police after allegedly giving the defendant his Miranda warnings, allegedly obtained a full oral confession. Judge Curtin did not suppress this confession but in rendering his decision at the trial he refused to "consider any statement made by the defendant, whatever it might have been,

to the Batavia Police Officers at the Headquarters" (T12)*.

Although the Batavia City Court was open the next morning for arraignments at 10:00 a.m. (42, 50, 52; See also the report of Patrolman Roth, Exhibit 6, Paragraph 9), the Batavia Police Department kept Michael Lee Jackson in custody and did not arraign him, let alone charge him with any crime until June 19, 1973, - five days after his arrest (95-96). Patrolman Roth admitted that the police "were going to wait and see whether or not the FBI wanted to charge him with a federal crime before you accused him of anything or arraigned him" (49). That was because so far as Patrolman Roth was concerned the Batavia Police Department had a "working relationship with the FBI" (48).

In response to questioning by Judge Curtin, Patrolman Roth admitted that "in the ordinary course of business" when the Batavia Police arrest somebody at night, the

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* At the Suppression hearing the police admitted, that while it was "a normal practice" to make out reports of an interrogation at Police Headquarters, no reports were made out in this case (63). Further, the police could produce no waiver of rights form signed by the defendant despite the fact that once back at Police Headquarters, it is "common practice" to have a defendant sign a printed waiver of rights form (64). At the suppression hearing, the police could not produce a signed written statement of the defendant despite the fact "that is normal practice" once back at Police Headquarters. And despite the fact that the Batavia Police were instructed to tell Assistant United States Attorney Wagner about all statements that had been made by the defendant, the Assistant United States Attorney was not told about those alleged statements until the very morning of the

defendant would "be taken into the City Court the next day and arraigned" (50). Had the defendant been arraigned in City Court the next morning at the designated time for arraignments, the City Court Judge pursuant to State Law would have been required "not only" to advise the defendant of his Constitutional Rights but would also have been required to "...take such affirmative action as is necessary to effectuate them". CPL Section 170.10(4) (a).

Shortly after noon on June 15, 1973, the day on which Michael Lee Jackson would have ordinarily been arraigned, two FBI agents from Buffalo arrived in Batavia and took a full written confession from the defendant, after having him sign a printed waiver of rights form (See Exhibits 1 and 2). The confession was taken from the defendant who had a sixth grade education (See Exhibit 2), a 78 I.Q. (See Probation Report), and who the FBI agent said was only able to pick out the words "the" and "of" when asked to read a simple sentence on

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suppression hearing-and the police could give no explanation for that conduct (69).

The police also testified that once back in the station house they learned that the defendant had "about a sixth grade education...had been living on potato chips for four days...had three cents in his pocket, and was hungry", but that they questioned him until about 2:00 o'clock in the morning, without giving him a meal (62, 67-69).

a plaque which was on the wall of the interrogation room (83). The FBI Agents began to read Jackson his waiver of rights form at 12:42 p.m. and by 12:45 p.m. had gotten Michael Lee Jackson to sign the form indicating that he knowingly and intelligently and voluntarily waived his constitutional rights protected by the Miranda decision, including the right to speak with an attorney before he decided whether or not to answer questions (See Exhibit 1, waiver of rights form).

On June 19, 1973, the defendant was finally charged with a crime - criminal possession of stolen property in the second degree - and on the same date was arraigned in the Batavia City Court (95-97, See also Exhibit 7).

On June 25, 1973, the defendant was taken to Buffalo by Federal Marshals and he was arraigned on June 26, 1973, before a Federal Magistrate on a comp.aint charging him with a violation of Title 18, Section 2312 (transporting a stolen motor vehicle in interstate commerce). Since his arraignment on the 19th of June, 1973, and the appointment of an attorney, he has made no further statement to any federal or state law enforcement agency.

POINT I

THE COURT BELOW COMMITTED CLEAR ERROR IN FAILING TO SUPPRESS THE ADMISSION GIVEN TO THE BATAVIA POLICE PRIOR TO THE TIME THAT THE DEFENDANT WAS ACTUALLY ARRESTED AND GIVEN HIS MIRANDA WARNINGS.

In United States v. Hall, 421 F.2d 540, cert. den. 397 U.S. 990 (1970), this Court in a landmark decision set forth the guidelines for District Courts to use in determining whether or not a person was "in custody or otherwise deprived of his freedom in some significant way so as to be entitled to the warnings described by the Miranda decision", and it held that "in the absence of actual arrest", the acid test was whether or not the police would "have heeded a request to depart or ...allow the suspect to do so". 421 F.2d at 545.

This Court pointed out in Hall Supra that that ultimate question was never asked of the FBI agent who had questioned the defendant but said that "this was just as well" because it did not want suppression hearings to degenerate into

> ...swearing contests in which law enforcement officers would regularly maintain a lack of intention to assert power over a suspect... and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire. 421 F.2d at 544.

Essentially then, a decision as to whether or not to suppress a statement must be made on a case by case basis. See

U.S. v. Phelps, 443 F.2d 246 (5th Cir. 1971)

Thus, the threshold question for this Court to determine is: Immediately prior to the time that one of the Batavia Police Officers asked Michael Lee Jackson if he had stolen the car, would the police have heeded his request to depart or would they have allowed him to do so?

In this case where it is uncontroverted that at 11:30 at night in a vacant alley in Batavia, New York, the defendant was in an automobile which the police knew was stolen, where the defendant could supply no personal identification whatsoever, could produce no registration for the automobile, where a police officer observed the defendant shut off the car by placing a screwdriver in the ignition, where the defendant said that his name was Smith, and that he was with a friend whose name was also Smith (27-28), surely this Court's credulity would be strained to the point of breaking to find that had Michael Lee Jackson placed his screwdriver back in the car's ignition, started up the motor and politely told the officers that he wished to go - that they would have "heeded his request to depart...and allow him to do so".

It is most respectfully submitted that claim is absurd, and in Hall Supra this Court stated that when such a claim is "absurd" 421 F.2d at 544, the statement must be suppressed. In the case at bar no reasonable man could have thought that Jackson's conduct was "susceptible of innocent explanation" 421 F.2d at 545.

Whereas, in Hall Supra this Court could confidently state:

> We have no reason to believe the agents would not have departed on request or allowed Hall to do so... 421 F.2d at 546,

in this case this Court can just as confidently state the contrary proposition.

In the Hall case, this Court also said: "The test [for determining when a person was in custody or otherwise deprived of his freedom in some significant way] must be an objective one" 421 F.2d at 544. Judged by the objective facts known to the police, and the objective facts known to the defendant - who saw the patrolman interrupt his second interrogation of him to go to his radio and say something in a voice which he could not hear, and then within "one or two minutes at the most" (11) see another patrol car drive up, two patrolmen get out, come around the car and ask the defendant "Did you steal the car?" - clearly the police conduct "convey[ed] a flavor of some affirmative action by the authorities other than

polite interrogation". 421 F.2d at 544.

The Government may attempt to rely upon United States v. Gibson, 392 F.2d 373 (4 Cir. 1968) which this Court cited with approval in Hall. In that case, however, the police did not know for a certainty that the defendant was in possession of a stolen car, and all the other elements present in this case (the screwdriver, etc.) were absent in Gibson Supra. Additionally, the questioning by the police in Gibson was conducted in the course of a "routine investigation" 421 F.2d at 545. In this case, though, Officer Roth admitted that prior to the time the defendant was asked whether or not he had stolen the car, the case had already gone "beyond a routine stage of investigation" (25) (emphasis supplied) - and that was why he had called for help (25).

The Government may also claim that there was another suspect in the case - the other "Smith". In the first place, Officer Roth had testified that he did check the Mancuso Building, where Jackson had said that the other Smith was, but that the patrolman learned that the building was 'secure" (8). Additionally, even if there were another Smith, each Smith could have been equally guilty of possessing a stolen automobile. Even assuming arguendo the existence of two Smiths, one Smith would not mutually exclude the other as a suspect. In any event, Judge Curtin himself thought that Jackson's story about having another friend nearby, that Patrolman Roth could not find,

whose name was coincidentally also Smith, was under all the circumstances of the case, "a joke" (18).

The Government may also argue that the admission given to the police at the car was a "spontaneous declaration", or a "volunteered" statement, making it admissible as an exception to the Miranda rule. In United States v. Phelps, 443 F.2d 246 (5 Cir. 1971), the Court held that for an admission to be considered a "spontaneous declaration" or "volunteered", the conversation must have been "initiated" by Phelps [the defendant]." See also United States v. Hopkins, 433 F.2d 1041 (5 Cir. 1970).

In this case, where it is undisputed that the questioning at the car was initiated by the police, Jackson, in giving a responsive answer, cannot be said to have "volunteered" any information (31-32).*

It is most respectfully submitted, in light of the uncontroverted facts of this case, that prior to the time

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* Judge Curtin in his decision after the suppression hearing stated:

> Richardson asked the defendant: 'Is that your car?' When the defendant answered 'no', he was asked whose car it was. The defendant replied: 'I don't know, I stole it.'(See decision of Judge Curtin P.3, Exhibit 4)

It is submitted that the Court's finding in that regard was erroneous, and that the question which was asked was "Did you steal the car?" to which the defendant responded, "Yes", (31-32). Of course if the question were "Did you steal the car?" the Government cannot possibly argue that the answer was "volunteered" or "a spontaneous declaration".

the defendant made his incriminating admission, no reasonable man could believe that the Batavia Police Officers would have "heeded Jackson's request to depart...or allow him to do so". Although Jackson was not at that time under formal arrest, he was in the custody of the Batavia Police and the District Court committed clear error in not suppressing his statement.

POINT TWO

THE COURT BELOW ERRED IN NOT SUPPRESSING THE CONFESSION THAT THE DEFENDANT GAVE TO THE FBI BECAUSE

A. THE CONFESSION WAS TAINTED BY THE FIRST ILLEGAL STATEMENT TAKEN BY THE BATAVIA POLICE;

B. THE CONFESSION WAS THE PRODUCT OF AN UNLAWFUL STATE DETENTION;

C. THERE WAS A WORKING RELATIONSHIP EXISTING BETWEEN THE STATE AND FEDERAL AUTHORITIES; AND

D. THE TOTALITY OF CIRCUMSTANCES AND THE BLATANT DISREGARD OF THE DEFENDANT'S RIGHTS REQUIRE THIS COURT TO SUPPRESS THE CONFESSION.

A.) In United States ex rel Stephen J. B. v. Shelly, 430 F.2d 215 (2d Cir. 1970), this Court was faced with a fact situation strikingly similar to the case at bar. In that case where a young defendant's first two admissions that he had stolen an automobile were ruled invalid because he had not been given his Miranda warnings, this Court ordered two subsequent statements to be suppressed although they were secured only after the defendant had been fully advised of his Miranda warnings. This Court in explaining its decision stated:

> Whether we characterize the rationale as the 'cat out of the bag' theory or not, the simple likely conclusion is that when a suspect in the rapid sequence of events present here, has already admitted his guilt, he will be far less likely to give intelligent consideration to later requests to waive his rights to remain silent and to have his counsel present, since he will regard them as meaningless. 430 F.2d at 219.

In Stephen J. B. Supra this Court cited with approval Mr. Justice Harlan's concurring opinion in Darwin v. Connecticut, 391 U.S. 346, 350-351 (1968) where he said:

> A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose be repitition. If a first confession is not shown to be voluntary, I do not think a later confession that is merely a direct product of the earlier one, should be held to be voluntary. It would be neither conducive to good police work nor fair to a suspect, to allow the erroneous impression that he had nothing to lose to play a major role in a defendant's decision to speak a second or third time.

Mr. Justice Harlan also stated that the burden would rest upon the Government of proving that "the later confession... was not directly produced by the existence of the earlier confession". In this case, where within a 14-hour period (the time period roughly comparable to that in the Darwin case) the defendant had made three admissions, "each admission cannot be viewed without reference to what happened so shortly before", 430 F.2d at 219.

Thus, the rationale expressed by the Supreme Court in Bayer v. United States 331 U.S. 532 remains viable and applicable to the facts in the case at bar.

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always must be looked upon as fruit of the first. 331 U.S. at 346 (1947)

This is not to say that the defendant contends that an illegally obtained confession always taints any later confession. In Collins v. Beto, 348 F.2d 823 (5 Cir. 1965), the 5th Circuit discussed how the original taint could be purged. The Court said the taint could be purged either by 1) "A sufficient lapse of time , cf. United States v. Bayer, 1947, 331, U. S. 532, 541" [or, 2)] "A significant change in circumstances. cf. United States v. Morin, 3 Cir., 1959, 265 F.2d 241, 245-246 (appointment of counsel)." Certainly, neither of those circumstances occurred in this case. Thus, the Government has totally failed to meet its burden of proving that the taint of "the later confession...was not directly produced by the existence of the earlier [admission]" Darwin v. Connecticut Supra at 351.

B.) THE CONFESSION WAS THE PRODUCT OF AN UNLAWFUL STATE DETENTION.

There is a rule of law deduced from Elkins v. United States, 364 U. S. 206, which abolished the "silver platter doctrine" and Wong Sun v. United States, 371 U. S. 471, which delineated the "fruit of the poisoned tree" doctrine, that holds that the Federal Government may not use a confession which is the fruit of an unlawful State detention, even if there was no "working relationship" between State and Federal authorities.

In United States v. Burhannon, 388 F.2d 961 (7 Cir. 1968) the Seventh Circuit found that the arrest of the defendant Burhannon by Indianapolis, Indiana police was unlawful, and that therefore Burhannon was unlawfully in custody. As in the present case, Burhannon was not arraigned or even formally charged with a state offense, but was questioned by Federal agents who took a confession from him. The Seventh Circuit in reversing the judgment of conviction, relied upon Wong Sun and Elkins Supra, and stated that "In custody incriminating statements of Burhannon which were made...to Federal agents... were tainted by the unlawful arrest [made by the local police] and therefore should have been excluded" 388 F.2d at 964. The Court did not even bother to deal with the issue of whether or not there was a "working relationship" existing between Federal and State authorities.

In United States v. Coleman, 322 Fed. Sup. 550 (E.D. Pa.), Judge Joseph S. Lord, III, suppressed the statement taken by FBI agents despite the fact that he found that "the confession was 'voluntary'", 322 Fed. Sup. at 556. Judge Lord stated "It is well settled that the Federal Government may not use a confession which is the fruit of unlawful activity of State authorities. Elkins v. United States, 364 U. S. 206" 322 Fed. Sup. at 556. He further pointed out, citing Wong Sun that the Government could only "satisfy its burden if it proves that the connection between the lawless police activity

and the confession 'had become so attenuated as to dissipate its taint'". Wong Sun v. United States, 371 U. S. 471, 479.

In this case, at the time that Jackson's written confession was being taken, the Batavia Police were engaged in clearly lawless conduct and the taint of illegal detention had just begun. The police had not charged him with anything, and they had not arraigned him, although he could easily and conveniently have been arraigned that morning. The police admitted that they "were going to wait and see whether or not the FBI wanted to charge him with a Federal crime before [they] accused him of anything or arraigned him" (49). And by not arraigning him, they were sealing him from the only person whose duty it was to see that his Constitutional rights were not merely stated to him but were "effectuated"*, the Batavia City Court Judge. Whether judged by Federal standards or State standards- see People v. Townsend, 33 N.Y.2d 37, 41; 347 N.Y.S.2d 187, 190, where the Court of Appeals said:

> It is impermissible for the police to use a confession, even if it be otherwise voluntary, obtained from a 17-year-old defendant when, in the course of extracting such confession, they have sealed off the most likely avenue by which the assistance of counsel may reach him by means of deception and trickery. -

the illegal detention of Jackson should preclude the Government from introducing his confession at trial.

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*CPL Section 170.10 (4) (a)

C.) THERE WAS A WORKING RELATIONSHIP EXISTING BETWEEN THE STATE AND FEDERAL AUTHORITIES.

In this case where a Batavia Police Officer admitted that the defendant was not charged with any crime until five days after his arrest because the police "were going to wait and see whether or not the FBI wanted to charge him with a Federal crime before [the police] accused him of anything or arraigned him" (49) and where it was admitted that this was done because the Batavia Police Department had a "working relationship with the FBI" (48), the Court below should have suppressed the confession given to the FBI agents. There was enough evidence in this record from the facts surrounding the illegal detention, and the admissions by Patrolman Roth, to have required the Government to go forward and rebut the prima facie case established by the defense. Although the working relationship doctrine has become a not very important weapon in the defendant's arsenal since the advent of Wong Sun and Elkins Supra, it cannot be disregarded by this Court. See Anderson v. U. S., 318 U. S. 350.

D.) THE TOTALITY OF CIRCUMSTANCES AND THE BLATANT DISREGARD OF THE DEFENDANT'S RIGHTS REQUIRE THIS COURT TO SUPPRESS THE CONFESSION.

In United States v. Edmons, 432 F.2d 577, 584 (2d Cir. 1970) this Court stated that "We are not obliged here to hold that when an arrest made in good faith turns out to have been

illegal because of lack of probable cause, an identification resulting from the consequent custody must inevitably be excluded. But in a case like this where flagrantly illegal arrests were made for the precise purpose of securing identification that would not otherwise have been obtained, nothing less than barring any use of them can adequately serve the deterrent purpose of the exclusionary rule. (Emphasis supplied).

In Collins v. Beto Supra, Judge Friendly of this Court, sitting by designation, stated that while "minor errors by the police are hardly to be avoided...when the police operate in calculated and substantial disregard of the applicable rules, they cannot expect the benefit of any doubts as to undue pressure in a truly close case." 348 F.2d at 834

The Government may argue to this Court as it did below, that Westover v. United States, 384 U. S. 436 (1966) requires this Court to uphold the validity of the confession that the FBI took from Jackson. However, in Westover, the Supreme Court reversed the defendant's conviction because "...in obtaining a confession from Westover, the Federal authorities were the beneficiaries of the pressure applied by the local [police's] in custody interrogation" 384 U. S. at 496-497. This was true said the Court "Despite the fact that the FBI agents gave warnings at the outset of their interview..." (Emphasis supplied) 384 U. S. at 496.

In this case where the FBI took a statement from an illiterate and mentally defective youth, who had not gone past the sixth grade, who, from his own point of view, had already told the same story to different police officers at the same

station house less than twelve hours before, it cannot be said that the defendant knowingly, intelligently and voluntarily waived his right to remain silent and his right to consult with an attorney prior to making any statements. This is true particularily because there is not "even the slightest basis in the record for inferring that he might have known that he had not yet legally incriminated himself." Stephen J. B. Supra at 218

Federal Courts do not need convictions based on such shoddy police activity and basic disregard of the most fundamental Constitutional rights. Because "We are dealing here with Federal convictions...while the Government's conduct here may not have been criminal, it departed so far from Constitutional standards that a Federal Court could not simply look the other way." Edmons Supra at 585

POINT THREE

THE ERRORS COMPLAINED OF CANNOT BE CONSIDERED HARMLESS

The only direct evidence linking the defendant with the "transportation" of the automobile in interstate commerce were his alleged admissions and confessions. Without those statements, the trier of fact has only a permissible inference which it could use to find the defendant guilty. See U. S. v. Evanco, 373 F.2d 429, 431-432 (2d Cir. 1967) and U. S. v. Lefkowitz, 284 F.2d 310, 313 (2d Cir. 1960).) In the absence of those statements, this Court could not find, beyond a reasonable doubt, that the trier of fact would have found the defendant guilty, Chapman v. California, 386 U. S. 18 .

Additionally, in United States v. Blair, 470 F.2d 331 (5 Cir. 1972) Cert. den. 93 S.Ct. 1536 (1973), the Fifth Circuit held that "Illegal police interrogations can hardly be deterred if we close our eyes to official indifference in the name of harmlessness...therefore, [the] conviction must be reversed and the case remanded for a new trial," 470 F.2d at 338-339. In this case too, because of the blatantly illegal interrogations, the defendant's conviction must be reversed and the case remanded for a new trial.

POINT FOUR

TITLE 18, SECTION 3501 IS UNCONSTITUTIONAL.

In the Court below the defense attacked the validity of Jackson's first admission, which he made to the police at the automobile, solely on the ground that it was given in violation of the Miranda decision.

The Government in its opposing Brief relied exclusively on the Miranda decision and the judicial exceptions carved out of that decision for its position that the statement taken at the car should be admitted into evidence. The Government did not ever argue that the statement should be admissible under Title 18, Section 3501. (See Government's brief below).

It is postulate that a Court of Appeals will not hear an argument from a litigant who has not raised the argument below. This is particularly true when the issue at hand is the Constitutionality of a Federal Statute. Edmons Supra, at 585-586. Therefore, the constitutionality of Section 3501 is not an issue for this Court to pass on - as that issue might relate to the statement taken by the police at the car.

The defense, for the record, raises its argument which it first raised below that Title 18, Section 3501 is unconstitutional - and should not be applied to the confession taken by the FBI, because it attempts to legislatively overrule Miranda. See United States v. Davis 456 F.2d 1192, 1197, where Judge Murrah citing this Court's opinion in United States v. Schipani, 414 F.2d 1262 Affg. 289 F. Sup. 43, 59-60 Cert. denied 397 U. S. 922, stated in his dissent that "Imperatives based on constitutional principles cannot, of course, be subverted by mere legislation."

CONCLUSION

It is respectfully submitted that the judgment of conviction be reversed.

Respectfully submitted,

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